

STATE OF MICHIGAN
COURT OF APPEALS

DELLITA JOHNSON, a/k/a DELITTA
JOHNSON, a/k/a DELITA JOHNSON, as Next
Friend of JEROME JOHNSON, JR., a Minor,

Plaintiff-Appellant,

v

CITY OF DETROIT and DETROIT HOUSING
COMMISSION,

Defendants-Appellees.

UNPUBLISHED
October 24, 2006

No. 264125
Wayne Circuit Court
LC No. 04-421569

DELLITA JOHNSON,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant.

No. 264221
Wayne Circuit Court
LC No. 04-421569-NO

DELLITA JOHNSON, a/k/a DELITTA
JOHNSON, a/k/a DELITA JOHNSON, as Next
Friend of JEROME JOHNSON, JR., a Minor,

Plaintiff-Appellee,

v

CITY OF DETROIT and DETROIT HOUSING
COMMISSION,

Defendants-Appellants.

No. 264232
Wayne Circuit Court
LC No. 04-421569-NO

Before: Saad, P.J., and Jansen and White, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

Because I conclude that when the facts are viewed in a light most favorable to plaintiff, genuine issues existed whether defendant had notice of the defective premises under MCL 125.663, and whether defendant established actual prejudice from the alleged failure to receive notice, I respectfully dissent.

Plaintiff testified that after her son Jerome was diagnosed with lead poisoning at age two, he was treated at Herman Kiefer Hospital and tested there every month. Plaintiff testified that a van from Herman Kiefer would pick her and Jerome up at least once a month, transport them to the hospital, and he would be tested. At plaintiff's deposition, a photograph was admitted of Jerome sitting with his dad at the kitchen table in the Jeffries Project apartment, which depicted paint peeling, flaking or chipping along a window sill and paint flaking off pipes in the kitchen. Plaintiff testified that Jerome was around two or three years old when the photo was taken.

Plaintiff also testified that after Jerome was first diagnosed with lead poisoning, a lead paint inspector either from the City of Detroit's Health Department or Herman Kiefer came to her apartment and inspected it with an electronic device. Plaintiff testified that this inspector wrote down information as he inspected her apartment, and told her that there was lead in the apartment and that the apartment should be repainted. Plaintiff testified that she then "went straight to management" of the housing project, at a location she referred to as the "rent office," and reported the hazard. Plaintiff's testimony regarding the lead-paint inspection of her apartment is consistent with the City's inspection protocol, as set forth in a study of lead paint at the Jeffries housing project, a copy of which plaintiff submitted below. This study, conducted in 1996 by Housing Environmental Services, Inc. (HES), and an earlier study conducted by NTH Consultants in 1994, both were performed at defendant City's request, and both reported lead paint hazards found at the Jeffries project. The HES study, entitled "Lead-Based Paint Risk Assessment Report Form", set forth the City's inspection protocol and reporting procedure:

The City of Detroit Department of Health (CDDH) maintains a listing of all DHD [Detroit Housing Department] properties and addresses. When the CDDH receives notification of a confirmed EBL [elevated blood level] of 20 ug/dl or greater, a CDDH inspector notifies the DHD immediately.

Once a lead poisoning case is established by the CDDH, medical and environmental follow-ups are performed. A CDDH nurse will visit the child's home and educate the family on lead poisoning and to follow-up on the child. A lead inspector from the CDDH also visits the child's home to investigate the source of the lead poisoning.

Under this protocol, defendant City's Health Department would have received notice of Jerome's elevated blood level, a Health Department inspector would have "immediately" notified defendant's Housing Department thereof, and medical and environmental follow-ups would have ensued. Plaintiff's testimony regarding such follow-ups supports that the protocol was, in fact, followed and that, pursuant to that protocol, the DHD was immediately notified of Jerome's elevated blood level.

Given that plaintiff submitted below the evidence described, and that inferences therefrom must be drawn in plaintiff's favor, I cannot agree with the majority's determination that there is no question of fact regarding whether defendant received notice as required under the former MCL 125.663. Nor can I agree with the determination that plaintiff offered no evidence to rebut the City's claim that it had been prejudiced by her failure to provide sufficient notice. The majority's conclusion that "lack of proper notice in this case therefore deprived the City of an opportunity to timely investigate the conditions present in plaintiff's building before it was torn down," is contrary to the facts when viewed in a light most favorable to plaintiff, as is required when reviewing a summary disposition determination under MCR 2.116(C)(10).

Defendant asserted below that because the building plaintiff and Jerome lived in was razed in 1997, it was thus prejudiced by the alleged lack of notice because there was no building to inspect for a lead paint hazard. This ignores the NTH and HES studies, copies of which plaintiff submitted below. The HES study, conducted at defendant's request in 1996, found lead paint hazards throughout the Jeffries project, common areas and otherwise. Plaintiff's expert's affidavit submitted below stated that the lead-based paint and dust hazards identified in the HES and NTH reports at the Jeffries Project constituted dangerous conditions and presented an unreasonable risk of harm and injury to children under the age of six, including the minor plaintiff. The record does not support that defendant was entitled to summary disposition on the ground that it established actual prejudice.

I would reverse the circuit court's dismissal of plaintiff's Count I, and affirm the circuit court's denial of summary disposition of plaintiff's contract claim.¹

/s/ Helene N. White

¹ I come to this conclusion not due to a lack of notice, but because plaintiff is not a third-party beneficiary of the contract.